ESSAY

THE BURDEN TO PROVE LIBEL: A COMPARATIVE ANALYSIS OF TRADITIONAL ENGLISH AND U.S. DEFAMATION LAWS AND THE DAWN OF ENGLAND'S MODERN DAY

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I. INTRODUCTION

When the United States of America declared its independence from the Kingdom of Great Britain on July 4, 1776, the fledgling country looked to distance itself from certain practices of the English Crown, particularly by rejecting a monarchical system. Problematically for this endeavor, though, the English common law tradition had been widely respected in the colonies. So, among the first legislative acts taken by many of the newly independent states was to adopt the already established, predictable, and structured body of English common law by way of a "reception statute," which gave legal effect to the existing laws to the extent that they had not been rejected by the new government.[1] For instance, the New York Constitution of 1777[2]

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states:

> [S]uch parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same.[3]

The Treaty of Paris was signed on September 3, 1783,[4] marking the end of the American Revolutionary War, with the United States of America officially and formally gaining its sovereignty and independence from Great Britain. Despite this separation, the legal traditions of the two countries remain very similar to this day. However, with respect to the common law of defamation, U.S. laws have evolved on a drastically different path.

II. LIBEL TOURISM

In recent years, England's centuries-old (and arguably antiquated) libel statute has caused significant hardship for those trying to exercise their right to free speech because of an increase in "libel tourism"—the practice of international forum shopping for defamation cases. Under English law, a libel defendant is guilty until proven innocent.[5] This presumption has resulted in a disproportionate number of libel cases both from British citizens

his friendship, insight and wisdom. I would also like to acknowledge the affirmation and support of Mr. Daniel Kornstein, an outstanding defamation lawyer and friend who has fearlessly stood at the forefront of the American libel reform campaign. Thank you to my research assistant, Isaac Glovinsky, for his thorough and diligent work. The genesis of this Essay arose from my writings on libel tourism which inspired and led to the introduction of the Libel Terrorism Protection Act in New York State in 2007–2008.

1 KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 10 (1996). *See also* READINGS IN AMERICAN LEGAL HISTORY 424 (Mark de Wolfe Howe ed., 2001).

2 N.Y. CONST. of 1777, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2623 (Francis Newton Thorpe ed., 1909).

3 *Id.* art. XXXV, at 2635.

4 Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

5 ENGLISH PEN & INDEX ON CENSORSHIP, FREE SPEECH IS NOT FOR SALE: THE IMPACT OF ENGLISH LIBEL LAW ON FREEDOM OF EXPRESSION 2 (2009), http://libelreform.org/reports/LibelDoc_MedHiRes.pdf.

and "libel tourists" who sue their critics in London.[6] Libel tourism is threatening because libel tourists know that forcing the defendant to prove his innocence may lead to a retraction of the alleged libel and discourage other writers from publishing similar statements.[7] This is known as the "chilling effect" on free speech and investigative journalism,[8] a term derived from the landmark U.S. First Amendment case of *New York Times Co. v. Sullivan*.[9]

Libel tourism to common law countries is not an entirely new phenomenon.[10] As early as 1959, the American musician Liberace, chose to sue the *Daily Mirror* in the United Kingdom for allegedly publishing an untrue statement about him. The British court awarded him £8,000 ($22,400)—the largest libel settlement ever awarded up to that time.[11] More recently in 2000, a Russian businessman sued New York-based *Forbes* magazine in London and the dispute was ultimately settled with the magazine retracting the allegedly libelous claims.[12] In 2003, Dow Jones was sued by a businessman in Australia (a common law country), and lost, even though the alleged libel was posted on a website originating in the

6 *See* Press Release, Sweet & Maxwell, Number of Terrorism-Related Defamation Cases Almost Triples in a Year (July 26, 2007), http://www.sweetandmaxwell .co.uk/about-us/press-releases/260707.pdf.

7 *Contra* David Partlett & Barbara McDonald, *International Publications and Protection of Reputation: A Margin of Appreciation but Not Subservience?*, 62 ALA. L. REV. 477, 479 (2011) (attempting to paint the existence of the libel tourist in a more favorable light, as someone who encourages legal scholars to engage in a "comparative law scholarly exchange").

8 *See* Alan Dershowitz & Elizabeth Samson, *The Chilling Effect of 'Lawfare' Litigation*, GUARDIAN (U.K.) COMMENT IS FREE BLOG (Feb. 9, 2010, 8:30 AM), http://www.guardian.co.uk/commentisfree/libertycentral/2010/feb/09/libel-reform-radical-islamic-groups. *See also* James Chapman, *Libel Reforms 'Do Not Go Far Enough' to Protect Free Speech: MPs Worried Firms Flex Financial Muscle to Gag Opponents*, DAILY MAIL (U.K.) (Oct. 19 2011), http://www.dailymail.co.uk/news/article-2050718/Libel-law-reforms-far-protect-free-speech.html.

9 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) ("The opinion of the Court conclusively demonstrates the *chilling effect* of the Alabama libel laws on First Amendment freedoms . . . ." (emphasis added)).

10 *See* Elizabeth Samson, *Libel Tourism is Real*, GLOBAL POLITICIAN (May 11, 2008), http://www.globalpolitician.com/24708-libel-laws.

11 *Liberace Wins Libel Suit: Writer's Slur Costs $22,400*, ASSOCIATED PRESS, June 17, 1959, *available at* http://news.google.com/newspapers?nid=2206&dat=19590617&id=HXhVAAAAIBAJ&sjid=Jz8NAAAAIBAJ&pg=2561,512320; *see also* Ben Welter, *Thursday, June 18, 1959: Liberace Wins Libel Suit*, STAR TRIB. (Minn.) YESTERDAY'S NEWS BLOG (Feb. 6, 2006, 1:28 AM), *available at* http://blogs2.startribune.com/blogs/oldnews/archives/70.

12 Berezovsky v. Michaels, [2000] UKHL 25 (appeal taken from Eng.).

United States.[13]

Although the practice of libel tourism has existed for some time, American efforts since 2008 to shield its citizens from libel tourism via monumental legislation has created "'international embarrassment' that sees rich and powerful foreigners flocking to [English] courts to silence critics."[14] This has led to an unforeseen backlash against England, the severity of which has yielded significant parliamentary efforts to reform English libel laws.

In January 2008, the New York State Legislature took action to protect one of its own citizens and safeguard Americans from the dangers of libel tourism. In response to a December 2007 article entitled *Last Stop on the Libel Tour*,[15] which discussed the case of an American writer with a *de minimis* connection to England who was convicted of libel *in absentia* by the English High Court, two New York legislators—Assemblyman Rory Lancman and New York State Senator Dean Skelos—introduced the Libel Terrorism Protection Act.[16] The Act amended New York's long-arm statute to close a loophole in the law that previously prevented the courts from taking action to protect its citizens.[17] The Court of Appeals of New York had rejected the writer's petition to prevent enforcement of the English judgment, not based on the merits, but because personal jurisdiction in New York did not extend to the foreign party, or "non-domiciliary," and there was no law from which the court could derive its authority.[18] Since the foreign law upon which the English court based its ruling offered less protection than the free speech

13 *Dow Jones & Co. Inc. v Gutnick* (2002) 210 CLR 575 (Austl.). *See also* David F. Partlett, *The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications*, 47 U. LOUISVILLE L. REV. 629, 632 (2009).

14 Chapman, *supra* note 8.

15 Elizabeth Samson, *Last Stop on the Libel Tour*, JEWISH WK. (N.Y.C.) (Dec. 5, 2007), http://www.thejewishweek.com/editorial_opinion/opinion/last_stop_libel_tour. *See also* Elizabeth Samson, *Uniting to Protect the First Amendment*, JEWISH WK. (N.Y.C.) (May 2, 2008), http://www.thejewishweek.com/editorial_opinion/opinion/uniting_protect_first_amendment (discussing the genesis of the Libel Terrorism Protection Act as being inspired by the article *Last Stop on the Libel Tour*).

16 Libel Terrorism Protection Act, 2008 N.Y. Sess. Laws 586 (McKinney) (codified at N.Y. C.P.L.R. 302, 5304 (McKinney 2011)).

17 *See* Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?*, 4 N.Y.U. J.L. & LIBERTY 252, 276 (2009).

18 Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830 (N.Y. 2007), *aff'd*, 518 F.3d 102 (2d Cir. 2008). The case was certified to the New York Court of Appeals from the United States Court of Appeals for the Second Circuit. Ehrenfeld v. Mahfouz, 489 F.3d 542 (2d Cir. 2007).

guarantees of the U.S. Constitution, the new legislation gave New York courts the teeth they needed to protect New York State citizens. On April 30, 2008, New York Governor David Paterson enacted the Libel Terrorism Protection Act, recognizing the danger posed to Americans' constitutional free speech rights in the face of libel tourism.[19]

The Libel Terrorism Protection Act served as the prototype for federal legislation called the Free Speech Protection Act introduced in 2008 in the 110th Congress.[20] Though the bill had support in both houses of the U.S. Congress, it failed to gain traction and did not pass. However, in 2009, a revised version of the bill was introduced in the 111th Congress under the title Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act.[21] This version gained wide support, passed both houses of Congress, and was signed into law by President Barack Obama on August 10, 2010.[22]

In parallel to the legislative measures under way in the United States, English PEN and Index on Censorship issued a report in November 2009 entitled *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression*, which warned that England ran the risk of becoming a 'global pariah' because libel tourism threatens free speech.[23] Since that time, several measures have been suggested for amendment, such as reducing fees lawyers can claim under conditional fee agreements, expanding the definition of "fair comment," and strengthening the public interest defense.[24] In his endorsement of libel reform legislation in 2009, U.K. Justice Secretary Jack Straw warned that fees for defamation lawyers "seem to . . . incentivis[e] 'libel

19 *See Attorney Instrumental in Libel Terrorism Protection*, JEWISH WK. (N.Y.C.) (May 7, 2008), http://www.thejewishweek.com/news/new_york/attorney_instrumental_libel_terrorism_protection.

20 Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. (2008); S. 2977, 110th Cong. (2008).

21 Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C.A. §§ 4101-4105 (West 2010).

22 *See* Press Release, White House, Statement by the Press Secretary on H.R. 2765, H.R. 5874 and S. 1749 (Aug. 10, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/08/10/statement-press-secretary-hr-2765-hr-5874-and-s-1749.

23 *See* ENGLISH PEN & INDEX ON CENSORSHIP, *supra* note 5.

24 Isabel Oakeshott & Steven Swinford, *Jack Straw Pledges Action to End Libel Tourism*, SUNDAY TIMES (U.K.) (Nov. 22, 2009), *available at* http://www.libelreform.org/news/411-jack-straw-pledges-action-to-end-libel-tourism.

tourism' . . . ."[25] Nonetheless, the House of Commons abandoned the legislation early in 2010, only to see it revived again in a new form in early 2011.

On March 15, 2011, the U.K. Ministry of Justice introduced a draft of the proposed Defamation Act of 2011 (Draft Defamation Bill)[26] for "public consultation and pre-legislative scrutiny."[27] The Consultation Paper in which the draft is contained is a comprehensive document that details the areas deemed in need of reform as a result of a "particular[] concern[] . . . that the threat of libel proceedings . . . not [be] used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism and the valuable work undertaken by nongovernmental organisations."[28] In an effort to curb libel tourism, the Justice Ministry also expressed its "wish to reduce the potential for trivial or unfounded claims and address the perception that our courts are an attractive forum for libel claimants with little connection to this country, so that our law is respected internationally."[29]

The amendments to the defamation statute include defenses for truth, for matters of public interest, for "honest opinion," and for privilege.[30] The reformers' efforts, however, are lacking as they have rejected amending the most obvious and troublesome cause of libel tourism—the "burden of proof" (the responsibility of a party to provide evidence to prove his innocence), which in defamation cases lies with the defendant. The Draft Defamation Bill only requires that the plaintiff or claimant prove that a defamatory statement was made,[31] affirming the already existing practice, which requires that once the plaintiff has shown that his reputation was disparaged, the courts will presume that the statement is false and that it damaged the plaintiff.[32] The

25 *Id.*

26 *See* MINISTRY OF JUSTICE, DRAFT DEFAMATION BILL: CONSULTATION, 2011, Cm. 8020, at 65-71 (U.K.) [hereinafter Draft Defamation Bill], *available at* http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf. It should be noted that the reform measures apply only to England and Wales, and not the entire United Kingdom. *Id.* at 6. For the purposes of this Essay, any mention of England with respect to libel reform measures refers to the reforms in both England and Wales.

27 *Id.* at 3.

28 *Id.*

29 *Id. See also* Thomas Sanchez, Note, *London, Libel Capital No Longer?: The Draft Defamation Act 2011 and the Future of Libel Tourism*, 9 U. N.H. L. REV. 469 (2011).

30 Draft Defamation Bill, *supra* note 26, at 66-69 (Defamation Act §§ 2-5).

31 *Id.* at Annex E, at 99 ¶ 4 (Evidence Base (for summary sheets), Introduction).

32 *See* Michelle A. Wyant, *Confronting the Limits of the First Amendment: A Proactive*

defendant still must prove the statement's truth. The Bill states:

> The burden of proving that the material is defamatory lies with the claimant. However, the claimant is not required to show that the material is false; there is a rebuttable presumption that this is the case and it is for the defendant to prove otherwise.[33]

By declining to change the burden of proof, the Joint Committee on the Draft Defamation Bill—the libel reformers, as they are—seem not to comprehend or acknowledge the most basic and fundamental cause of the libel challenges facing England today. While expanding the scope of the various defenses is certainly important and valuable, libel tourism does not flourish in England because "fair comment" has failed to provide as much protection from litigation as "honest opinion." Rather, it thrives because England's libel law is plaintiff-friendly, as opposed to U.S. law, which favors the defendant.

III. THE EVOLUTION OF U.S. DEFAMATION LAW: DIVERGING PATHS FOR THE BURDEN OF PROOF

Much of American law is derived from the English common law tradition. One primary subject upon which the laws of England and the United States markedly diverge is defamation and, most interestingly, the burden of proof in such cases.[34]

Although there are instances in criminal law, both in the United States and England, where a burden of proof can *shift* from the plaintiff to the defendant, the English common law tradition always places the initial burden of proof on the plaintiff, *except* in defamation cases. England's defamation statute has always required the defendant to prove his innocence.[35] Upon originally adopting English common law following American independence, U.S. defamation law shared this position. Ultimately, however, the United State chose to abandon it. History may reveal why England and the United States adhere to different standards for the burden of proof in the context of defamation cases.

Approach for Media Defendants Facing Liability Abroad, 9 SAN DIEGO INT'L L.J. 367, 378 (2008).

33 Draft Defamation Bill, *supra* note 26, Annex E, at 99 ¶ 4 (Evidence Base (for summary sheets), Introduction).

34 *See* Bachchan v. India Abroad Publ'ns, 585 N.Y.S.2d 661, 663 (Sup. Ct. 1992) ("[T]he difference between the American and English jurisdictions essentially comes down to where the burden of proof lies . . . .").

35 *See infra* notes 36-45 and accompanying text.

The English common law of criminal (or seditious) libel originated in 1606,[36] in the court of Star Chamber at the Palace of Westminster, where the earliest recorded cases of libel are found.[37] The Star Chamber's purpose was to protect the sovereign from criticism, insurrection, and breaches of the peace by trying seditious libel and treason cases[38] against "nobles [who] were too powerful" to be tried in lower courts.[39] The Star Chamber—infamous under Charles I for issuing rulings favoring the king—was eventually abolished in 1641 by Parliament's Habeas Corpus Act,[40] passed the year before. Although the court of Star Chamber dissolved, its practices set the standard for criminal libel as being any statement that was disparaging, regardless of its truth.[41]

England's Glorious Revolution of 1688 (which marked the ouster of King James II) and Bill of Rights of 1689[42] further enhanced Parliament's powers and limited those of the Crown. Despite this new order, respect for authority still influenced the exercise of expression. To date, the English Bill of Rights only protects the "freedome of Speech and Debates or Proceedings in Parlyament,"[43] but does not provide guarantees for the general population outside of Parliament's chambers. Traditionally, English society was a hierarchical system based on nobility, status, and honor.[44] Even after the monarchy was no longer central to politics, and the power of Parliament's House of Lords had diminished in favor of the House of Commons, deference to social betters remained a key part of the political and social order.[45] So,

36 *See* de Libellis Famosis, (1606) 77 Eng. Rep. 250 (Star Chamber), *available at* oll.libertyfund.org/title/911/106331.

37 *See* Russell L. Weaver & David F. Partlett, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Defamation Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 61 (2006).

38 CHARLES A. RUUD, FIGHTING WORDS: IMPERIAL CENSORSHIP AND THE RUSSIAN PRESS, 1804–1906, at 9 (1982).

39 MARTIN L. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 22 (4th ed. 1924).

40 An Act for the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber (Habeas Corpus Act), 1640, 16 Car., c. 10, § 1 (Eng.).

41 RUUD, *supra* note 38, at 9.

42 Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *available at* http://www.legislation.gov.uk/aep/WillandMarSess2/1/2 (last visited Apr. 5, 2012).

43 *Id.* ("Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.").

44 *See* Partlett, *supra* note 13, at 634-35.

45 *Id.*

the burden of proof remained plaintiff-friendly—if a person insulted someone's honor, he was then was responsible for proving his own case.

English *criminal* libel law rejected the truth defense because even a true statement could lead to a breach of the peace. *Civil* libel law, however, allowed a truth defense because private claims posed a lesser threat to public order, since offenses were between individuals, as opposed to criminal libel, which was an offense against the Crown.[46] Nonetheless, a truth *defense* offers far less protection to the accused than a *presumption* of truth. Despite significant similarities between U.S. law and English common law, America's Founding Fathers differed from the English on the issue of fundamental freedom. The U.S. Bill of Rights—adopted in 1791 to protect citizens from the tyranny of a king or strong central government—enshrined that protection in the Bill's First Amendment, which prohibits Congress from making laws that "abridg[e] the freedom of speech, or of the press."[47] Honor, reputation, and status, though important, were not as central to social and political life in America. Freedom was paramount, and so the presumption of truthfulness eventually became the cornerstone of American libel law as a result of three monumental cases.

The first case was the trial of *New York Weekly Journal* publisher John Peter Zenger, decided in the colonial court on August 4, 1735.[48] Zenger was charged with the criminal offense of seditious libel (under English common law) for publishing articles that criticized the Crown's appointed colonial governor, William Cosby.[49] Zenger's lawyer, Andrew Hamilton, did not dispute the allegations against his client, but rather argued that a true statement could not be libelous, even though truth was not a permitted defense to seditious libel at the time.[50] English libel law

46 *See* RUUD *supra* note 38, at 9.

47 U.S. CONST. amend. I.

48 Trial of John Peter Zenger, 17 Howell's St. Tr. 675 (1735). *See also Zenger Order of 'Not Guilty*,' HIST. SOC'Y CTS. ST. N.Y., http://www.courts.state.ny.us/history/Zenger_order.htm (last visited Apr. 4, 2012) (an image of the original August 4, 1735 order in the case of the King vs. John Peter Zenger) ("The Jury Brought in their Verdict of not guilty.").

49 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 21 (Melvin I. Urofsky & Paul Finkelman eds., 2d ed. 2002).

50 *See* William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J. 48, 48 (1996); DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, *supra* note 49, at 21.

was established for instances "where the king's safety or honour was concerned."[51] Thus, Hamilton argued that an incident in New York does not have the "dangerous consequences that it might in Westminster-hall," and so England's libel law should no longer apply.[52] Despite Zenger's confession of 'guilt,' Hamilton convinced the jury to disregard the law as immoral and unjust—a practice called jury nullification—and Zenger was acquitted.[53]

While often celebrated as a victory for freedom of speech and of the press, neither English nor U.S. libel laws changed because of the Zenger trial.[54] The case opened the door, however, to broader free speech rights, and it set the stage for what was to come.[55]

The second case, *People v. Croswell*,[56] resulted in a formal break with English precedent and officially established truth as a defense to criminal libel in America. In *Croswell*, Harry Croswell was criminally charged with the seditious libel of President Thomas Jefferson.[57] After the lower court convicted Croswell, he appealed to the Supreme Court of New York, which was then the state's highest bench.[58] Alexander Hamilton—unrelated to Andrew—defended Croswell on appeal, arguing that "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals."[59] While two of the four justices found merit in Hamilton's argument, the other two looked to the law as it existed and noted that New York law was still derived from English law. Since the court was divided, it was

51 *Zenger*, 17 Howell's St. Tr. at 697-98.

52 *Id.* at 697.

53 Glendon, *supra* note 50, at 48. The Zenger case was the first instance of jury nullification in the colonies. *See id.* The case paved the way for the practice in the American judicial system leading to its use by juries who find the government's laws to be morally repugnant or unpopular.

54 *See* DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, *supra* note 49, at 21.

55 *See id.* at 21-22.

56 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

57 *Id.* at 337-39. After Thomas Jefferson was elected President in 1803, his new administration sought to avenge the honor of Republican journalists who were brutally prosecuted by the Federalists under the notorious Sedition Act of 1798. To make an example of a Federalist press, Republicans charged Harry Croswell—the young editor of a new Federalist newspaper called *The Wasp*—with seditious libel of President Jefferson. *See generally* Paul McGrath, People v. Croswell—*Alexander Hamilton and the Transformation of the Common Law of Libel*, 7 JUD. NOTICE 5 (2011).

58 3 Johns. Cas. at 341-42.

59 *Id.* at 360.

required to uphold Croswell's conviction.[60] But the following year in 1805, the New York State Legislature incorporated Alexander Hamilton's argument into law and amended New York's criminal defamation statute to include the truth defense to libel.[61]

Truth as an absolute defense to defamation was formally written into the New York State Constitution of 1821.[62] Article VII, section 8—concerning the freedom of speech and press and material evidence in libel cases—stated:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence, to the jury; and if it shall appear to the jury that the matter charged as libellous [sic] is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.[63]

Rather significantly, permitting the introduction of the truth as evidence ultimately led to the presumption of truth in libel cases—placing the burden of proving falsehood on the plaintiff.

The third case, *Sullivan*, extended the standard of truthfulness and placed an even heavier burden on the plaintiff. Under *Sullivan* a plaintiff who is a public figure must show that a publisher acted with "actual malice"—i.e., knowledge that the published information was false or recklessly disregarded the truth.[64] As a result of *Sullivan*, the burden of proof under U.S. defamation law shifted from the defendant to the plaintiff, marking a formal departure from the standards of the English libel statute.[65]

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60 *Id.* at 362-63.

61 1805 N.Y. Laws c. 90, § 2, *reprinted in* People v. Croswell, 3 Johns. Cas. 337, 412 (N.Y. Sup. Ct. 1804).

62 N.Y. CONST. of 1821, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2639 (Francis Newton Thorpe ed., 1909).

63 *Id.* art. VII, § 8, at 2648.

64 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See* Weaver & Partlett, *supra* note 37, at 66 ("*Sullivan* changed common law doctrine and practice in the United States."); *see also id.* at 66-68.

65 Weaver & Partlett, *supra* note 37, at 67.

IV. RESPONSES AND REFORM

Even prior to the introduction of the Draft Defamation Bill, England had been making progress towards meaningful libel reform. Since 1999, what is known as the "*Reynolds* defense" has served as a beacon of hope for libel reformers. The case of *Reynolds v. Times Newspapers Ltd.*[66] extended the "qualified privilege" defense to the mass media. The defense provides protection from defamation lawsuits for responsible journalists who publish information that is in the public interest, even if the information is ultimately found to be untrue.[67]

The case of *Jameel v. Wall Street Journal Europe*[68] affirmed the *Reynolds* defense and streamlined its guidelines. At the time of the ruling, *Jameel* was considered to be "[the dawn of] [a] revolutionary new era of defamation law in Great Britain."[69] After the decision was rendered, the lawyer for the *Wall Street Journal Europe* stated: "The decision is an important step in moving freedom of speech closer to that enjoyed by the U.S. media under the First Amendment."[70] This may have been true, but it is still not close enough, because despite the progress of *Jameel*, the burden of proof remains squarely on the defendant.

The *Reynolds* defense, with the *Jameel* expansion, is similar in its application to the standard derived from *Sullivan*. However, in the United States, the defendant's truthfulness is presumed and the plaintiff must prove the defendant acted with actual malice, while in England the defendant must invoke the *Reynolds* defense and prove his own innocence. In other words, despite the progress of *Reynolds*, English libel law is still plaintiff-friendly. A more broadly effective libel reform measure for English law would be to shift the burden of proof from the defendant to the plaintiff,

66 [1999] UKHL 45, [2001] 2 A.C. 127 (appeal taken from Eng.). *See generally* Russell L. Weaver, Andrew T. Kenyon, David F. Partlett & Clive P. Walker, *Defamation Law and Free Speech:* Reynolds v. Times Newspapers *and the English Media*, 37 VAND. J. TRANSNAT'L L. 1255 (2004) (discussing the balance between reputation and free expression).

67 *See* Weaver & Partlett, *supra* note 37, at 71-72.

68 [2006] UKHL 44, [2007] 1 A.C. 359 (appeal taken from Eng.).

69 Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165, 167 (2007).

70 Frances Gibb, *Landmark Ruling Heralds US-Style Libel Laws in Britain*, TIMES (U.K.) (Oct. 12, 2006), *available at* http://www.singaporedemocrat.org/articletimeslibel laws.html.

thereby eliminating the root cause of many potential libel tourism cases.

In a related measure, on January 12, 2010, England's obsolete criminal libel law was eliminated by section 73 of the Coroners and Justice Act of 2009.[71] Abolition of the defunct criminal libel law was a positive step towards bringing the written statutes in line with actual practice. But despite this long-overdue measure, the English civil libel law that remains is still anachronistic and the Draft Defamation Bill is not sufficiently inclusive to update an outmoded concept. In modern-day England, obligating a libel defendant to bear the burden of proof is a requirement that is a relic of the past—a mere prop or support for a hierarchical structure that serves no real purpose and essentially no longer exists.

Yet, the libel reformers responsible for the Draft Defamation Bill, holding steadfast to the common law tradition of favoring reputation over free speech, have rejected any attempt to include the burden of proof as an item in serious need of reform. It was requested that the Draft Defamation Bill consider changing the burden of proof in cases involving corporations,[72] effectively requiring "that the corporation would have to prove that the allegation made against it was not true."[73] However, the Joint Committee dismissed the suggestion out of hand saying:

> Proving a negative is always difficult, and it may be unduly onerous on a corporate claimant to require them to prove the falsehood of the allegations. We therefore do not consider that any formal reversal of the burden of proof is appropriate.[74]

The language of the Draft Defamation Bill nearly analogizes the large corporation to King Charles I in the seventeenth century, with the weaker underling yielding to the greater and more powerful leader. This demonstrates that perhaps English libel reformers are still clinging to a remnant of old attitudes. Interestingly, the Joint Committee's response exemplifies the cultural differences between the United States and England, which have not been entirely bridged even after all these years. England

71 Coroners and Justice Act, 2009, c. 25, § 73 (Eng.) ("The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished—(a) the offences of sedition and seditious libel; (b) the offence of defamatory libel; (c) the offence of obscene libel.").

72 Draft Defamation Bill. *supra* note 26, §§ 143-144, at 54.

73 *Id.* § 144.

74 *Id.*

is a highly traditional society which modernizes itself at its own pace. Unfortunately in this case, it would seem that requiring a complaining entity to prove falsehood is too great a burden for English law to impose upon the plaintiff at this point in time.

It is exactly the imposition of that substantial burden in the United States—having evolved through judicial precedent—that American law views as imperative to the protection of the First Amendment right to free speech.[75] Despite the fact that the societal and legal developments of the past few years have yielded the current reforms under consideration, the cultural divide and the internalization of the importance of reputation as the guiding principle of English defamation law are preventing the most necessary and important reform measure. Yet, we need not resign ourselves to accepting the immutability of the English standard simply because our flags and customs are different. If England is serious about restoring the international image of its courts, it would be beneficial for reformers to examine the way in which the American burden of proof protects free speech to a greater degree than current English law.[76]

It is ironic that the defendant's burden of proof in England was established to protect people's honor, as it has now resulted in London's public disgrace as the "libel capital of the western world."[77] Laws that were initially designed to defend the integrity of the Crown through the courts are now primarily employed to enable foreigners to misuse the English judiciary for their own ends—i.e., to silence the speech of their detractors. With serious efforts at libel reform on the horizon, England now has the opportunity to amend its laws and remove the archaic remains of an obsolete notion. The time has come to set things right and make the libel plaintiff prove his case.

75 *Contra* Susanna Frederick Fischer, *Rethinking* Sullivan*: New Approaches in Australia, New Zealand, and England*, 34 GEO. WASH. INT'L L. REV. 101, 185 (2002) ("Some commentators contend that the balance of U.S. libel law is tipped too far in favor of free expression and against the protection of reputation.").

76 *Contra* Partlett, *supra* note 13, at 658-60.

77 *Be Reasonable*, TIMES (London), May 19, 2005, at 19. *See also* EMILY C. BARBOUR, CONG. RESEARCH SERV., R41417, THE SPEECH ACT: THE FEDERAL RESPONSE TO "LIBEL TOURISM" 2 n.8 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41417.pdf.